

The Public Nature of Private Adjudication

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The system of public justice is in trouble, perhaps deeper trouble than that in which the system of justice perennially finds itself. It is beset by such delay that civil cases on the general docket in many jurisdictions take more than five years to get to trial.¹ "Big" civil cases involve a discovery and pretrial apparatus that makes the legal process in *Bleak House* pale in comparison² and a trial stage in which, some observers believe, the issues are untriable, at least by a jury.³ Civil cases generally involve seemingly excessive transaction costs, both for the parties⁴ and for the public.⁵ Criminal cases are brought to trial more rapidly under the imperative of the speedy trial requirement.⁶ However, this adherence to a nominally efficient schedule on the criminal side is achieved at a high price, often revealed in the prosecutor's erratic selection of cases for prosecution. Symptoms of trouble on the criminal side include a large number of dispositions without trial⁷ and pervasive plea bargaining.⁸ Big criminal

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1. See ABA Action Comm'n to Reduce Court Costs and Delay, *Attacking Litigation Costs and Delay* 1 (1984).

2. Planet, Smith, Olson, & Connolly, *Screening and Tracking Civil Cases: Managing Diverse Caseloads in the District of Columbia*, 8 Just. Sys. J. 338, 342-43 (1983).

3. See *In re Japanese Electronics*, 631 F.2d 1069, 1084-90 (3d Cir. 1980) (seventh amendment does not guarantee the right to jury trial where the lawsuit is so complex that the jury will not be able to perform its task of rational decision-making); *ILC Peripherals Leasing v. International Business Machines*, 458 F. Supp. 423, 447-49 (N.D. Cal. 1978), *aff'd sub nom. Memorex v. International Business Machines*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1980) (where issues in the case are beyond the practical abilities and limitations of a jury, a legal remedy is inadequate and equity jurisdiction will attain so that a jury is not required).

4. See, e.g., Institute for Civil Justice, *Rand Corp., An Overview of the First Six Program Years* 23 (1986) (approximately 55% of total awards for damages and legal fees going to injured parties), *cited in* Rowe Working Paper, *infra* note 10, at 10. See also R. Posner, *The Federal Courts: Crisis and Reform* (1985).

5. See, e.g., Levin & Colliers, *Containing the Cost of Litigation*, 37 Rutgers L. Rev. 219, 222 (1985) (rising percentage of GNP dedicated to legal costs). See generally Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 Cath. U.L. Rev. 267 (1985).

6. U.S. Const. amend. VI. See generally R. Misner, *Speedy Trial: Federal and State Practice* (1983).

7. C. Pinkele & W. Louthan, *Discretion, Justice, and Democracy: A Public Policy Perspective* 47-53 (1985).

8. R. Adelstein, *The Negotiated Guilty Plea: An Economic and Empirical Analysis* 1 (1984).

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cases become so complex that they, too, may be untriable by ordinary procedure, while ordinary criminal cases are placed on a procedural treadmill that trivializes the ideals of criminal procedure and the social purpose of penal sanctions.⁹ Many domains of administrative agency adjudication suffer similar ills. The obvious symptoms are, again, delay and high transaction costs; the less obvious indications are erratic patterns of disposition and the dominance of process over substantive coherence.

When the public system of justice no longer functions effectively, there are powerful incentives to create private systems of justice.¹⁰ Private systems of justice, which today often are referred to as Alternative Dispute Resolution (ADR) procedures, hold a strong attraction, particularly when compared with a decrepit public court system.¹¹ Nevertheless, "justice" is an inherently public activity, as this analysis is designed to demonstrate. Because of the fundamentally public nature of the justice to be administered, a system of private justice worthy of the name must substantially replicate important characteristics of the public system.

I. Prospects for Reform

The deficiencies of the American system of justice to some extent are endemic to any system of administered justice, certainly to one that seeks to be "neutral" among contending social forces.¹² All systems of public justice are vulnerable because they provide "public goods"; every potential user would prefer that someone else pay to keep the system ready for use. This free-rider problem explains why public services exist in the first place—to make everyone help pay—and why efforts to improve the system garner little political support. Unlike many legislative and allocative decisions in which particular groups stand to gain or lose and consequently lobby for particular action, reform of the justice system only marginally benefits any particular group. Furthermore, reform may occur whether

9. Margolick, *In Search of Efficient Justice: Reforming the Criminal Court*, N.Y. Times, July 2, 1983, at A1, col. 2; Jenkins, *The Lobster Shift: One Night in the Nation's Busiest Court*, 72 A.B.A.J. 56 (1986).

10. We thank Professor Thomas D. Rowe, Jr. of Duke University Law School for the stimulus provided in his study "Path to a 'Better Way': Litigation, Alternatives, and Accommodation" (ALI Working Paper, Sept. 1987), to be published in 1988 [hereinafter Rowe Working Paper].

11. For a general review of the literature on the advantages and disadvantages of ADR, see Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 Tulane L. Rev. 1 (1987), and citations contained therein.

12. M. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* 103 (1986).

or not any particular group provides its political support. Thus no group has a strong interest in reform, and each is content to wait for another to take the initiative.

One might expect the legal profession nevertheless to take the lead in legal reform. Lawyers and judges seem to have the greatest interest in improving the system of public justice. However, lawyers often directly benefit from elaborate procedures, and judges are not supposed to undertake political initiatives. Consequently, it is difficult to motivate the bar to press for change through the political process, and any such effort is unlikely to succeed.

The difficulties of developing political support for improving the system of justice are aggravated by the peculiarities of the public service that the court system performs. In the most general sense, the system of administered justice is a public service whose purpose is maintenance of peace and order in the community.¹³ The cost of maintaining this system would be lower if everyone behaved according to agreed norms. The administration of justice is a service required only because there are "bad actors" who impose on others the externalities of their misconduct.

Until final judgment is reached in a particular case the system has to respond as though either party to the dispute could be the "good guy." Yet when the system's work product is viewed in the aggregate, it appears to be an expensive effort for the benefit of people of whom at least half may be, in some sense, troublemakers. Thus, considered as a social service, the administration of justice is a morally ambiguous undertaking for which it is especially difficult to develop a political constituency.

With respect to the administration of justice, as with respect to many other public services, Americans evidently aspire to a higher standard of service than they are willing to pay for on a sustained basis. We expect a civil justice system that is expeditious and inexpensive, while also permitting high-intensity advocacy on behalf of the parties, extensive formal and informal pretrial discovery of evidence, elaborate trial procedures including jury trial in many cases, and appeals of right.¹⁴ We say we want both technical competence and democratic participation in conducting the process.¹⁵ We also

13. Hazard, *Rationing Justice*, 8 J. L. & Econ. 1, 2-3 (1965).

14. F. James & G. Hazard, *Civil Procedure*, 1-9, 38-44, 223-408 (1985).

15. See *Peters v. Kiff*, 407 U.S. 493, 499-502 (1972) (opinion of Marshall, J.) (fourteenth amendment due process clause forbids a state from subjecting a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner).

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say we want free access to courts without abuse of process.¹⁶ On the criminal side, we seek not only all of these features, but also the provision of state-compensated counsel for accused persons who cannot afford representation,¹⁷ who constitute a substantial fraction of the criminal caseload.

Implementation of these policy aspirations by internal reform in the court system is a generally unpromising possibility. The policies must be implemented through a highly decentralized apparatus of justice mandated by our federalist tradition. We have separate systems of state and federal courts, separate state and federal prosecutorial authorities, and separation of the bar from the bench. The administration of both the state and federal courts systems is highly decentralized, with the result that judges are law unto themselves in a wide range of official functions. If the bar ever had sufficient cohesion to impose standards of competence and forbearance on its members, it has little such cohesion today.¹⁸ If the bench and bar ever had a common interest in maintaining a respectable system, they tend today to be immured in their separate bureaucracies and world views.¹⁹ If there were ever any inclination to impose efficient administration on the mechanism as a whole, or even within its various components,²⁰ the effort would be doomed to substantial failure.

The administrative balkanization of the system is complicated further by the diffusion of policymaking authority for determining the goals and procedures that the system is to pursue. Many particulars of the system are dictated by constitutional provisions, such as those governing tenure of judges²¹ and the right of jury trial.²² These provisions are virtually impervious to change, even though if reconsidered on their merits today they might not be enactable in the terms in which they were originally cast. Both legislatures and appellate judiciaries have substantial authority to prescribe goals and procedures. Moreover, federal and state judicial systems have different supporting constituencies and are governed by different con-

16. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (a pattern of baseless, repetitious claims may constitute an abuse of judicial process stripping defendants of their immunity from antitrust laws).

17. *Gideon v. Wainwright*, 372 U.S. 335 (1965) (right to counsel in a criminal trial is a fundamental right protected by the due process clause of the fourteenth amendment).

18. S. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 *Geo. L.J.* 705 (1981).

19. Fiss, *The Bureaucratization of the Judiciary*, 92 *Yale L.J.* 1442 (1983).

20. *See generally* Resnick, *Managerial Judges*, 96 *Harv. L. Rev.* 374 (1982).

21. U.S. Const. art. III, § 2.

22. U.S. Const. amend. VII.

stitutional provisions of often conflicting tenor.²³ For example, the constitutions of some states put judges on a short leash by selecting them by popular election for short terms, while federal judges hold life tenure.

Some features of the system of justice are dictated by unrefined popular sentiment translated into impulsive legislation, such that, in one decade, legislatures impose compulsory incarceration for sex offenses, and, in another decade, they do the same thing for drug offenses.²⁴ Other features are dictated by incremental budgeting, which marginally can increase or decrease available resources, but which ordinarily cannot generate enough financial energy to effect change in existing bureaucratic routine.²⁵ Congress, as the national legislature, may impose its view of administered justice on the states, of course, without providing the financial wherewithal to implement its policies.²⁶ The federal courts, generally a voice for special sensitivity and decency, have set procedural standards for the states that are beyond the capacity of the latter to implement except on an attenuated or sporadic basis. So the system, particularly the state judicial system in large cities, is disjointed, underfinanced, and beset by conflicting policy mandates.

The prospects for change through public, political initiatives also are not good. Evidently Americans do not care enough about the defects of the system, for the system is as it has been for at least two decades—in some cities, even longer. The civil justice system, which is the primary focus of the present discussion, is inextricably intertwined with the criminal system and is likely to stay that way. The system of administered justice in metropolitan areas today is dominated by the criminal calendar, which in turn is dominated by cases involving the poor, and more particularly by cases involving the minority poor. Improving the treatment of poor minorities accused of crime is not high on the general population's political agenda, nor is it likely to become so. If there were a move to segregate the civil justice system from the criminal justice system—with different judges and different courts—in all likelihood, it would be success-

23. Such differences are reflected in the composition of federal and state courts. Compare U.S. Const. art. III with Cal. Const. art. VI, §§ 15, 16, 18, 20.

24. See, e.g., Bruske, A Law Meets Reality—And Loses, *Washington Post*, May 11, 1986, at A1, col. 1; O'Neill, Jr., Prison for Child Molesters: the Impact of the 1981 MDSO Repeal and Mandatory Prison Legislation, 7 J. Juv. L. 1 (1983); Kohn, Stiff Penalties Upheld for Sale of Narcotics Near Schools, *N.Y.L.J.*, Nov. 8, 1985, at 1, col. 3.

25. See generally A. Wildavsky, *The Politics of the Budgetary Process* (1984).

26. See, e.g., Stark, Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. 94-142, 14 Conn. L. Rev. 477 (1982).

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fully resisted. Hence, the civil justice system is likely to remain hostage to public attitudes toward the administration of criminal justice and unlikely to be much improved in the foreseeable future.

This state of affairs creates strong incentives to consider other possibilities for achieving satisfactory civil justice. In understandable frustration, former Chief Justice Warren Burger has desperately and repeatedly called for "a better way" to do civil justice.²⁷ Indeed, some ways probably can be found to improve the public system of civil justice, and perhaps even the system of criminal justice. However, the prospects are not strong for reforms that, to a critical eye, will be sufficiently great in number, intensive in degree, and extensive in implementation to make much difference. Even if substantial minor reforms are accomplished, the average lay observer will continue to think, along with Chief Justice Burger, that there must be a better way—a better way to have administered civil justice that is not so prolonged, expensive, haggled-ridden, often inconclusive, and frequently arbitrary as that which the present public system produces.

II. *Alternative Public Tribunals*

One response to the deficiencies of ordinary public justice lies in the creation of public tribunals of specialized jurisdiction. The conventional interpretation of the emergence of specialized tribunals is that they respond to new social needs that are putting demands on the ordinary court system. It is often noted, for example, that the creation of the Interstate Commerce Commission (ICC) was a response to the emergence of the railroads and the need for more sophisticated tribunals to determine whether rates and service were "fair."²⁸ Similarly, the establishment of the National Labor Relations Board (NLRB) has been described as a response to the organization of labor in large-scale industry and the need for more sophisticated tribunals to determine whether the manner in which collective bargaining was being conducted was fair.²⁹

Sometimes the need for a new tribunal is explained not on the ground that the subject matter in question is too complex, but on the ground that the issues are simpler than those on the dockets of

27. Quoted in Rowe Working Paper, *supra* note 10, at 5.

28. See Donelan, A Century of the Interstate Commerce Commission: A Shipper's Viewpoint, 54 Transp. Prac. J. 151, 151-52 (1987). See also Delisi, Interstate Commerce Regulation, 1887-1987: The Carrier Viewpoint, 54 Transp. Prac. J. 262-91 (1987).

29. See A. Ordman, Fifty Years of the NHRA: An Overview, 88 W. Va. L. Rev. 15 (1985).

trial courts of general jurisdiction. Simple cases warrant simplified justice. This was at least one of the justifications offered for the creation of the workers' compensation boards and, more recently, the adjudication machinery provided under the Disability Benefits Program of the Social Security Act.³⁰ Either basis for creating specialized tribunals can be interpreted as a quest for a "better way"—a mechanism for dispute resolution "better" than our ordinary courts. A tribunal is better if it reaches more appropriate outcomes because its consideration of the issues is more sophisticated or if it reaches more predictable outcomes because the issues before it are simplified.

The characteristic that makes either approach better may be described as expertise. A specialized tribunal will have greater familiarity with the type of case over which the tribunal has jurisdiction. If the decisionmaker deploys his or her expertise in a suitable way, then, all other things being equal, the tribunal undoubtedly will function more expeditiously than a court of general jurisdiction. Transferring information to the jury is the principal reason that a jury trial generally takes more time and effort on the part of the professionals than does a bench trial. The specialized tribunal will not in each case have to incur the information costs of orienting itself to the type of case; it already will have that information.

Nonetheless, specialized tribunals may not offer all the benefits they are thought to provide. Any new tribunal is likely to appear relatively efficient early in its institutional career. It will have no backlog to start with, an immediate advantage over the general public courts. In addition, the judges of a newly constituted tribunal will dominate the proceedings and thus produce expeditious outcomes because the litigants will not yet have learned how to countermanipulate. Usually, however, the professional representatives of the parties soon will gain influence of their own and interrupt efficient operations with claims for greater procedural fairness. Unless judicial resources and judicial will are maintained, eventually the new tribunal is likely to resemble the old ones.

Justification of specialized tribunals on the narrow grounds of procedural competence is, at best, therefore, only part of the story. The specialized tribunals that have emerged over the course of history were not so much necessary as convenient to serve some set of implicit or explicit political purposes. The railroad rate cases *could*

30. J. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* 125-27 (1983).

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have been tried in trial courts; in the early days that is how they were adjudicated, and even today some railroad cases are adjudicated by ordinary tribunals.³¹ The cases coming before the NLRB could have been tried in courts of equity, and indeed were so under the regime disparaged as that of “the labor injunction.”³² The same is true of the workers’ compensation cases³³ and, at the level of judicial review, of Social Security disability cases.³⁴

The most salient of all examples of specialized tribunals created to meet substantive or political concerns—as opposed to procedural ones—is the creation of the system of federal courts.³⁵ The objectives of the Framers in establishing federal jurisdiction in diversity, admiralty, and matters arising under federal law plainly went beyond considerations of procedural efficiency or even “expertise” in any ordinary sense of the latter term.³⁶ Diversity jurisdiction addressed the fear that the state courts could not be counted on to provide even-handed justice.³⁷ In particular, the Framers were worried about claims by creditors against debtors—the “haves” against the “have nots.” The primary justification for admiralty jurisdiction in the federal courts was the need for uniformity in application of law to maritime commerce.³⁸ A further consideration supporting admiralty jurisdiction was the maintenance of a national front in those legal matters that implicate relationships with foreign powers. Admiralty jurisdiction, then, was intended not only to further procedural fairness, but also to meet concerns about the substance of judicial decisions. The justification for federal court jurisdiction in matters “arising under” federal law was even more directly political in the fundamental sense of that term. Legislative resolutions under the Articles of Confederation often had suffered what amounted to

31. Donelan, *supra* note 28.

32. See generally F. Frankfurter & N. Green, *The Labor Injunction* (1930).

33. See 1 *Workmen’s Compensation* §§ 9-10 (W. Schneider ed. 1941).

34. See 42 U.S.C. § 405(g) (1982). See also H. McCormick, *Social Security Claims & Procedures* § 691 (3d ed. 1983).

35. The federal courts were and are courts of a special jurisdiction carved out of that jurisdiction which preexisted in the state courts. The contours of federal jurisdiction, in operation if not in formal authority, have changed over the course of history. Originally, the principal exercise of federal court jurisdiction was in admiralty and in diversity. Today, the principal exercise of jurisdiction is in the supervision of the regime of federal regulation of economic activity and in the supervision of state and local government compliance with federal law, including constitutional protections of individuals.

36. J. Frank, *Historical Bases of the Federal Judicial System*, 13 *Law & Contemp. Probs.* 22-28 (1948).

37. See *Bank of the United States v. Deveaux*, 9 U.S. 61, 87 (5 Cranch) (1809) (Marshall, J.).

38. D. Robertson, *Admiralty and Federalism I* (1970).

nullification in the hands of the state courts.³⁹ Protecting federal policies was a quintessentially substantive, not procedural, concern.

Thus, the quest for different and better tribunals of specialized jurisdiction is always political to some extent, and often to a very large extent. A contemporary example of the influence of political considerations on jurisdictional structure concerns adjudication of grievances under the federal Fair Housing Act.⁴⁰ Cases arising under the Act involving claims of refusal to rent or sell housing on account of race have been within the jurisdiction of the civil courts; legislation is now pending that would create specialized administrative tribunals with concurrent jurisdiction of these disputes.⁴¹ The proponents of the legislation believe that such tribunals would offer "a better way," notably a procedure that would not require jury trial.⁴² Such a procedure will give a plaintiff (typically black) claiming discrimination a tribunal rather than a jury, which usually has a white majority.

Once specialized tribunals are created, they may take on characteristics other than those intended. The judges and lawyers will adapt to substantive and procedural norms that are peculiar to their tribunal's jurisprudence. They will share an informal lore about what is right and reasonable, which will be decisive at the margin in day-to-day dispositions and may indeed have greater influence than the substantive legal rules and the formal code of procedure that govern the tribunal. Repeat players of course will be more fully acquainted with the legal culture of a tribunal than will one-shot participants. The repeat players' advantage presents a legitimate source of concern about the tribunal's fairness to outsiders.

Only one step beyond our uneasiness about such effects is a deeper anxiety about the justness of tribunals of specialized jurisdiction. The tribunal's expertise may not consist simply of familiarity with the type of case, or of special technical knowledge necessary to understand the issues, but also may contain a predisposition toward

39. See F. Frankfurter & J. Landis, *The Business of the Supreme Court* 8-10 (1927).

40. 42 U.S.C. §§ 3601 et seq. (1977).

41. H.R. 1158, 100th Cong., 2d Sess. (1987) (Fair Housing Amendments). See also, H.R. 4119, 99th Cong., 2d Sess. (1986) (Fair Housing Amendments); S. 558, 100th Cong., 1st Sess. (1987) (Fair Housing Amendments).

42. See Hearing before the Subcomm. on Civil and Constitutional Rights of the Comm. of the Judiciary of the House of Representatives on H.R. 4119, Fair Housing Amendments Act, 99th Cong., 2d Sess., 41-43, 64-65 (1986) (statements of Peter W. Rodino, Jr., Chair of the House Judiciary Committee, and Rep. Hamilton Fish, Jr.). See also Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 826-31 (1985); Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 Am. B. Found. Res. J. 195.

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certain resolutions of such cases on the merits, at least at the margin. The problem is not one of plain and crude “packing” of the tribunal with persons favoring one side in the type of controversy over which the tribunal has jurisdiction. Of course, there have been instances when crude packing has been perceived—for example, in 1801, when the Federalists commissioned the “midnight judges” on the eve of the Federalists’ surrender of power in the executive and legislative branches. However, even when “packing” is not an issue, those who serve as judges in specialized tribunals—although they seek to be fair and impartial—will have backgrounds and frames of reference that tend to predispose them to take one side. Evidence of such bias frequently is cited in discussions of the politics of appointments to such tribunals as the NLRB, the Civil Aeronautics Board, the Federal Communications Commission, and, at the state level, the workers’ compensation boards and the public utility commissions—all of which exercise adjudicative jurisdiction.⁴³ The selection of judges for the federal bench also results in a subtle predisposition towards certain types of litigants.

Even persons who have a neutral and disinterested viewpoint when appointed to a specialized tribunal gradually will develop a parochial view of the matters coming before them. They will cease being generalists and no longer retain their former outlooks on the larger policy implications of their decisions. Some state court judges argue privately, for example, that federal judges who administer the fourteenth amendment “live in another world,” their decisions no longer reflecting community values. Others have criticized the NLRB and other specialized tribunals for rendering decisions that only take account of the parties before them and disregard broader market implications.⁴⁴

Inevitably, whether intended or not, specialized tribunals will produce results somewhat different from those that would be produced by the courts of general jurisdiction. As public alternatives to the general system of adjudication, such tribunals usually are created to correct perceived deficiencies in the general public courts, and they can offer more sophisticated and more efficient grievance resolution with less costly and less complex procedures. But the possibility also is great that the decisionmakers will bring or develop subtle

43. See, e.g., Gold & Silverman, *Reagan NLRB Reveals ‘Double Standard’ At Work*, *Legal Times*, Aug. 26, 1985, at 8, col. 1.

44. See, e.g., R. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *Yale L.J.* 1357, 1403 (1983) (administrative processes under the National Labor Relations Act should be replaced by traditional common law rules).

biases and myopic vision. If public tribunals of specialized jurisdiction evoke such criticisms, private tribunals for the administration of justice raise similar and perhaps more serious concerns.

III. *"Private Justice"*

Private tribunals come in myriad forms; commercial arbitration is perhaps the longest-established and most familiar. Modern examples of commercial arbitration include the system for dispute resolution among traders on a mercantile or stock exchange and the practices for resolving disputes under construction contracts and international transactions. Another more modern form of arbitration is the grievance procedure established in collective bargaining, which typically calls for negotiation and mediation but which culminates in arbitration.⁴⁵ Still another, perhaps less obvious, form of arbitration is the procedure in auction sales, where the terms of sale usually give the auctioneer final or nearly final authority to say what is a "bid" and who has made the winning one.

There are still further variations in the contemporary ADR movement, notably those in which the private adjudicative procedure is "annexed" to the court system. "Annexation" entails a supplemental or alternative decisional procedure to which the public tribunal may refer certain types of cases or certain types of issues. Thus, in civil cases, issues arising in discovery may be consigned to a special master, issues of liability may be submitted to a "mini-trial," issues of damages may be referred to an auditor, and various small cases may be considered in hearings where procedures are streamlined. The jurisdictional authority exercised in such annexed procedures derives from the court to which the procedure is connected. Because the parties are subject to that court's compulsory jurisdiction, they are more or less coerced to use the procedures when the court suggests that they do so.

When so annexed, such ADR procedures are essentially streamlined instruments of public justice. At the same time, the parties usually have incentives in addition to that of avoiding the judge's disappointment or wrath for employing the ADR procedure. These incentives include reduced court costs, an earlier exploration of the underlying facts, and an opportunity to formulate and evaluate the

45. Mediation involves a third party that is empowered to suggest terms for resolving the dispute. Arbitration involves a third party that is empowered to pronounce the terms of resolution.

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strengths of each party's case. In these respects, the parties to annexed systems of ADR partake of private justice.

Whatever the specific incentive to engage in it, the distinguishing feature of the private justice system is that participation is in some sense voluntary. While submission to the jurisdiction of the public courts is a matter of legal obligation, supported if necessary by the compulsion of force, submission to private justice depends on consent by both parties. The clearest case of voluntary use of private adjudication occurs when, after a dispute has arisen, parties submit to arbitration rather than going to court or relying on negotiation. A less evidently voluntary case is that of parties for whom the prospect of a dispute was anticipated and provision made in advance that any subsequently arising dispute would be arbitrated. Here, the consent to arbitrate is given on the basis of forecast and conjecture and to that extent is imperfect. Consent is even more attenuated when an arbitration provision is a term of an adhesion contract governing a relationship that the party is more or less free to enter; for example, a person may become a customer on a stock exchange governed by a standard contract having an arbitration clause or enter into employment that is governed by a collective bargaining agreement having an arbitration clause. At the furthest distance from the idea of consent stand the ADR systems annexed to courts, where the parties' choice to participate in the informal system is an alternative to a system to which they otherwise must submit. Thus, it seems accurate to say that while participation in private justice in principle is voluntary, in various circumstances this voluntariness is not complete.

IV. Can "Justice" Be Private?

According to a view widely held in contemporary society, voluntary arrangements should be left free from state interference. Private parties can organize their own businesses, clubs, and condominiums. Just as private parties are allowed to build their own roads, so also should they be allowed to provide their own justice. Such efforts help the state to conserve its scarce resources and allow independent actors to maximize their utility. However, in practice private adjudication entails contradictions that raise doubts about the concept of private justice itself. This problem can be explored by considering different dispute resolution procedures in radically simplified forms.

There are essentially four types of procedure: (1) unilateral dictate; (2) bilateral negotiated settlement; (3) public justice; and (4) forms that lie somewhere between bilateral negotiated settlement and public justice. This last category may be described as "private justice," but there are varying degrees of "privateness" in such forms, and perhaps corresponding gradations in the "justice" they afford.

A. Unilateral Dictate

Unilateral dictate is the resolution of a controversy between two parties in which the stronger party specifies the terms and the weaker accepts them. The settlement may follow use of force, as in the "unconditional surrender" imposed by the Allies on Nazi Germany and Japan to conclude World War II, or when the bully in prison beats a weaker inmate into submission. However, unless the stronger party simply exterminates the weaker one, the *actual* use of force is inadequate to resolve the dispute. Rather, the essential mechanism in such an arrangement is a *threat* to use force or some other kind of coercion.

We consider that unilateral dictate is usually unjust because we do not often observe unilateral benevolence on the part of a strong party in a dispute with a weaker one. Instead, we suspect that the terms of any settlement between parties of widely disparate strength involves maximization of self-interest by the stronger. However, to say that such a coerced settlement is *per se* unjust is to ignore certain complications. For example, a particular coerced settlement may be just in terms of its outcome, even though it is the product of coercion. In any event, in order to say that the settlement is just, there must be someone to say so.

There are three possible witnesses or evaluators of a settlement between two disputing parties: either of the two parties themselves or some outside observer. Were the stronger of the two parties to say that the settlement is just, a skeptic might reply: "If the settlement is 'just,' why did you have to resort to coercion to get it?" Were the weaker party to say that the settlement is just, the skeptic must wonder whether the weaker party's statement also was made under coercion. If, however, the weaker party is uncoerced when making an evaluation, there is an independent and reliable basis—the word of the weaker party—for concluding that the settlement is just.

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However, “we”—that is, anyone other than the two parties to the agreement—are likely to remain skeptical. The use of coercion prior to the settlement provides a sound basis for our suspicion that the weaker party would not have agreed to the settlement in the absence of coercion. Moreover, the prior use of coercion suggests that the weaker party may still be intimidated when making a post-settlement affirmation. Thus, any assessment “we” might make of the justness of a settlement cannot rest simply on the evaluations of the parties to the dispute. An assessment by the parties under the unilateral dictate scheme as to whether a settlement is just is formally coherent; however, it is implausible—its material truth is suspect. The assessment, to be plausible, must be made by a third party who has independently observed and assessed the situation.

This test of plausibility suggests that, with regard to a settlement arrived at where one party has had coercive power over the other, any intelligible assessment as to whether the settlement is “just” presupposes the existence of some third party to make that judgment. “Justice,” as a social event, is necessarily a public activity, in that it requires the presence of someone other than the parties to the dispute themselves. The third party need not mandate or suggest the terms of the settlement. It is only necessary that the third party be able to assess the settlement according to some implicit or explicit standard of his or her own.

B. Bilateral Dictate

The same analysis is used in evaluating the justness of a bilateral negotiated settlement. In the real world, parties to any negotiated settlement are subject to at least some coercion by circumstances, specifically by shortage of the things that are the subject of negotiation. If a buyer or an alleged wrongdoer has an indefinite amount of money, he or she could offer any amount to pay or buy off the other party. If a seller or an alleged victim had an endless supply of goods, he or she would be willing to forego payment for that which is sold or lost. But no one has infinite resources. Both parties must give up something to get something, and act under the coercion of shortage. The possibility therefore exists that the settlement is not “just.”

As in the case of settlement by unilateral dictate, it is possible to ask each of the parties to a negotiated settlement respectively whether they consider the terms to be just. Many agreements do not arouse our concern. Generally speaking, we are willing to ac-

cept the parties' entrance into the agreement as sufficient evidence that the terms were just, if not perfectly so. The premise that the parties in general know reasonably well what they are doing when they enter an agreement to resolve a dispute derives from the still broader premise that parties have the ability to enter contracts generally. The law of contract largely consists of defining the exceptions—those circumstances in which a contract did not arise or, if it did, where its consequences can be avoided. Nevertheless, as with contract negotiation, there are circumstances in dispute resolution—such as incapacity of one of the parties (as in the case of minors), mistake, fraud, or coercion—where we no longer presume that the parties can take care of themselves.

The impulse to inquire about the justness of a negotiated settlement will be particularly strong when the terms seem one-sided. Again, the parties can be asked. Again, each of them may say that the agreement was just. And again, an external observer will not be fully satisfied. The observer may suspect that the party who got the worst of the bargain still might be beset by whatever led the party into the detrimental agreement in the first place—fraud, mistake, coercion, and so on. Moreover, if one of the parties has complained that the agreement was unjust, his or her complaint could be suspect. We know that not only stronger parties but also weaker ones engage in maximization of self-interest. All contracts in the real world are based on imperfect information and uncertain expectations, particularly those that go wrong and lead to a dispute.

C. Public Justice

Consideration of these radically simplified cases of unilateral dictate and bilateral settlement illustrates that the presence of a third-party observer is necessary before any reliable statement can be made about whether justice has been done. In this minimal sense, an acceptable statement about justice being done, as distinct from one that is purely formal, presupposes a three-party community, i.e., one person in addition to the parties to the dispute. In principle, it is sufficient that the third person be an observer; it is not necessary that the third party be the judge or be authorized to pass on the terms of the settlement. It is enough that the terms are accessible to the third party, for then it is possible for a significant statement to be made as to whether the settlement is just. And by the same to-

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ken, the third party's access to the terms of settlement makes the matter "public."⁴⁶

We can compare this minimally public kind of justice with the kind rendered in the public courts of general jurisdiction. These courts render justice that is public in many ways. The system is supported by general tax revenues and its officials are selected by processes founded on public assent and in which the general public participates at least indirectly. The courts are available to anyone with a legal grievance except insofar as jurisdiction has been allocated to some other public tribunal or to arbitration of some kind. The dispute resolution process—particularly the trial—is conducted in public view, generally as a matter of constitutional law. Those who pronounce judgment are public agents speaking *ex officio*. Public justice is public in the most obvious sense.

D. Private Justice

If the previous analysis of private justice in Sections A, B, and C above is correct, then private *justice* is also public. Put differently, all systems of what meaningfully can be called justice are public to one degree or another. The difference between public justice and unilateral dictate or bilateral negotiation, insofar as they can be said to result in justice, is not that one is public and the other not. Rather, the difference is the scope and composition of the public that is in a position to assess the justness of the outcomes. The relevant question becomes whether the public environment of a private justice system is such that the system is subject to assessment in a way substantially similar to that in which the public system is subject to assessment.

A system of public justice is, at a minimum, designed to assist in the orderly maintenance of society according to an implicit set of values. Among other things, government sanction implies the direct threat of compulsion by the state. That threat imports a degree of clarity and forcefulness to the definition of justice that is particularized in the judgment. The state's direct involvement also conveys the message that society is unified against the condemned behavior. Determinations by a private tribunal lack this governmental imprimatur and therefore the corresponding social import.

46. For a discussion of the public/private distinction and the qualities that make something "public," see *supra* Starr, The Meaning of Privatization, 6 Yale L. & Pol'y Rev. 6, 7-13 (1988).

Realization of other public norms may be jeopardized by moving adjudication to a private arena. The advantages of speed and economy associated with private disposition often are realized at the cost of reduced solemnity and thoroughness of dispute resolution processes. To the extent that the private system's inquiry is less thorough, the private system permits the underlying power of the stronger party to persist undeflected.

Ironically, the potential damage to public norms from private dispositions may be limited because typically private dispositions are not open to the public. Public law enforcement is necessary to communicate legal values and to deter future violations. Decisions made in secret have diminished normative weight. Of course, all systems of private justice are subject, under particular circumstances, to some sort of appeal to "public justice" for review. However, appeal in these cases usually is available only on the basis of fraud or gross mistake. This limitation virtually precludes appeal on the merits of the controversy, and, even if the outcome is corrected on appeal, the private tribunal's initial decision may well be the most memorable to third parties.

Any decision by the state regarding the acceptability of a private justice system requires balancing the sacrifice of public values that private justice may entail against the values of individual free choice and speedier and less expensive dispute resolution. This determination can reflect a number of considerations. First, the acceptability of the private system depends, in part, on the substance of the underlying claims committed to its jurisdiction. Thus, disputes involving race discrimination in employment invoke values that would not be implicated in a mercantile dispute.

Second, it is relevant to inquire whether the private system has been constituted by a representative of a party to the dispute, rather than by the party itself. When an organization's representatives agree to private dispute resolution, they may sacrifice the procedural rights of the organization's individual members for gain in some collateral matter of interest to the organization. Some members of the organization might well prefer public justice but will have no real choice as a result of their obligations to the organization. Given that the primary justification for private justice is its consensual basis, the propriety of such a system necessarily is called into question when it rests on representative consent. A third fundamental consideration is the identity of the third-party participants—whether the "public" in private dispositions is composed of

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individuals of sufficient objectivity, judgment, and influence to act as proxies for the general public.

The participation of "repeat players" in this system accentuates this latter concern. The private nature of private fora might well incline third-party participants, consciously or not, to cater to those who may provide repeat business. For example, insurance companies that are repeat customers in insurance coverage arbitration might obtain more favorable results than they would receive in a public court. The opposing parties might not react to such favoritism by withdrawing, since arbitration would still produce significant cost savings. Further, one-time participants may not have complete information regarding the disadvantages they face in the private forum.

However, other factors may offset the repeat player advantage. A tribunal has leverage to induce repeat players to permit it to act impartially. The repeat players must consider the impact on their own future if the private forum acquires a reputation for partiality. That reputation will be communicated to influential observers, such as attorneys and judges, and, eventually, to the general public, which tends to identify with the one-shot players. These observers are in a position to disenfranchise an unjust system.

Conclusion

The contrast between resolving claims of right through public justice and resolving them through private disposition is stark in the extreme cases. Ordering by public justice means that decisions as between claims of right are made by an impartial third party. Ordering by private disposition may involve a unilateral decision by the stronger party. Ordering by public justice produces decisions resting on considerations that transcend the immediate dispute and the immediate parties. Ordering by private disposition can involve a normative frame of reference that includes only the immediate parties.

In the real life of a peaceful and productive community, the extreme cases rarely are directly juxtaposed. The system of public justice stands as a backup to private ordering conducted through myriad mediating institutions. Labor-management relationships have layers of mechanisms for intercession and mediation of workplace disputes. Relationships between businesses survive conflict and crisis through the mediatory efforts of the business people directly involved. Stable neighborhoods have systems of mutual sur-

veillance and control. Nuclear families hold together partly under the influence of members of the extended family. Where disputes over claims of right ripen into legal disputes and resort is made to lawyers, the lawyers have an interest in their system that usually dominates the immediate interests of their clients.

Systems of private disposition stand "in the shadow of the law" in the sense that they are influenced by the public system, are subject to its intervention, and ultimately must imitate it. If a procedure of arbitration really is prejudiced, it is subject to invalidation. Because systems of private disposition are vulnerable to this kind of collateral attack, those who run these systems have to work at making their outcomes acceptable. One way to make private justice acceptable to the system of public justice is, of course, to have it approximate the public system's own standards, or to improve on the public system's performance.

However, not only the shadow but the substance of the public system of justice influences systems of private disposition, whether arbitration, mediation, or negotiation. The stronger the public system, the more intensively it influences the private systems in the same social community. The weaker the public system, the more the private systems operate on their own. A system of private justice becomes fully private only if there is no public system of justice at all, as in the case of international relations, or if the public system is so weak and incompetent that it has no influence, as in situations where law and order has collapsed. But in these situations the medium of private disposition is private coercion and hardly qualifies as private *justice*.